SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 354

JOSEPH J. IMHOFF, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Regulations Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
I. The Prejudgment by the Army Physical Disability Review Board Prior to Its Actual Convening	9
II. The Applicable Directives and Regulations Require Issuance by the Physical Review Council of Specific Findings Which the Council Failed and Refused To Do	11
III. The Opinion of the Court of Claims Is in Direct Conflict with Its Opinion in *Weiner* v. *United States*	14
Conclusion	15

Appendix A	1a
Appendix B	31a
Appendix C	41a
Appendix D	47a
Appendix E	49a

CITATIONS

CASES:

Accardi v. *Shaughnessy*, 347 U.S. 260 ..... 10, 13
Atchison T. & S. F. R. Co., v. *United States*, 295 U.S. 193, 201-202 13
Automatic Canteen Co. v. *Federal Trade Commission*, 346 U.S. 61 12

Page

Bilokumsky v. *Tod*, 263 U.S. 149, 155 13
Bridges v. *Wixon*, 326 U.S. 135, 153 13
Caha v. *United States*, 152 U.S. 211, 221-22 13
Chapman v. *Sheridan Wyoming Co.*, 338 U.S. 621 13
Davidson v. *New Orleans*, 96 U.S. 97, 101 10
Dickson v. *United States*, 159 Ct. Cls. 185 (1962) 13
Dismuke v. *United States*, 297 U.S. 167 ..... 8, 10
Ex Parte Reed, 100 U.S. 13, 22 13
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 13
Jordan v. *Massachusetts*, 225 U.S. 167, 176 10
Morgan v. *United States*, 304 U.S. 1, 15 ..... 10, 12
Panama Refining Co. v. *Ryan*, 293 U.S. 388 12
Paul v. *United States*, 371 U.S. 245, 255 13
Railroad Commission v. *Pacific Gas Co.*, 302 U.S. 388, 393 10
Reynolds v. *United States*, 292 U.S. 443 8
Roberts v. *United States*, 151 Ct. Cls. 360 (1961) 13
United States v. *Chicago M. St. P. & P. R. Co.*, 294 U.S. 499, 510, 511 12
United States v. *Pierce Auto Freight Lines*, 327 U.S. 515 12
Weiman v. *Updegraff*, 344 U.S. 183 10
Weiner v. *United States*, 148 Ct. Cls. 445 (1960) 14, 15

STATUTES:

28 U.S.C. 1255(1) 2
10 U.S.C. § 3916, Officer Personnel Act of 1947, as amended, Section 514(d)(4) 6
70 Stat. 857 (1956), Servicemen's and Veterans' Survivor Benefits Act, ch. 837 7
10 U.S.C. § 1214 10
10 U.S.C. § 1216 10

MISCELLANEOUS:

DA Pamphlet 21-48/AF PAM 34-4-1 ..... 2, 3, 11
Army Regulation 15-160 ..... 3, 9, 11

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v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on October 14, 1966.

OPINION BELOW

The Opinion of the United States Court of Claims is unreported at this date, but will appear in 177 C. Cls. . It is reprinted herein as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1). The Opinion of the Court of Claims dismissing the petition filed by petitioner was decided on October 14, 1966. A motion for reconsideration was denied on April 14, 1967.

QUESTIONS PRESENTED

The Department of the Army denied petitioner's application for disability retirement. In the processing of a retirement application, the Secretary of the Army has promulgated regulations which guarantee petitioner fair consideration of his application before several boards. This processing by the Secretary of the Army, acting through designated subordinates, was procedurally defective, thus presenting these questions:

(1) Is it repugnant to the guarantees of procedural due process for the decision of the Army Physical Disability Appeal Board to be issued by the office of The Adjutant General two days prior to the actual meeting of the Board itself to consider petitioner's appeal?

(2) Whether the Secretary of the Army, acting through his designated subordinate, the Physical Review Council, must comply, and if so, whether he has complied with his own[1] directives which guarantee to petitioner the right to submit a rebuttal on the point of disagreement between the Council and the Physical Evaluation Board?

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[1] The Department of Defense pamphlet in question is a joint directive issued simultaneously by the Secretaries of the Army, the Navy, the Air Force, and the Treasury, and is applicable to the retirement of all Armed Forces personnel.

(3) Whether such directives issued by the Secretary of the Army have the force and effect of law?

(4) Is the opinion by the Court below, on the important question of the applicable standard as to what constitutes physical disability under the law to be applied in determining such disability, in conflict with the established decisions involving this same question?

REGULATIONS INVOLVED

This case involves:

(1) Department of Defense publication—DA Pamphlet 21-48/AF PAM 34-4-1, effective 14 January 1952, issued By Order of the Secretaries of the Army and the Air Force (and reissued 14 August 1953 by Order of the Secretaries of the Army, the Navy, the Air Force and the Treasury), and printed in pertinent parts in Appendix B attached hereto.

(2) Army Regulation 15-160 (20 August 1953) establishing procedures for processing disability claims under Title IV, § 411, Career Compensation Act of 1949 (63 Stat. 823; 37 U.S.C. 281), and printed in pertinent parts in Appendix C attached hereto.

STATEMENT OF THE CASE

Petitioner was first commissioned in 1926; entered on extended active duty as a Captain, Field Artillery Reserve in 1941; promoted to Lieutenant Colonel, Regular Army, in 1949; and to Colonel on December 1, 1956.

In 1949, while serving on active duty in the Philippines, petitioner fell and injured his spine. During 1950 and 1951, he experienced severe low back pain and was placed under the care of an orthopedic surgeon.

In July 1953, he was ordered to enter Brooke Army Hospital, Fort Sam Houston, Texas. His attending physician at this hospital submitted a report of medical examination which showed petitioner not qualified for military service.

On July 27, 1953, a Medical Board, consisting of three medical officers, convened at Brooke Army Hospital, diagnosed petitioner's disabling condition as (1) degenerative joint disease and (2) lumbosacral strain and found petitioner permanently unfit for military service.

On June 30, 1953, petitioner appeared before a Physical Evaluation Board convened at Brooke Army Hospital which found petitioner physically unfit to perform the duties of his office, rank or grade by reason of physical disability incurred during his military service.

Petitioner's case was reviewed by an Army Physical Review Council in Washington, which in August 1953, through the Office of the Adjutant General, reversed the disability determination by the Physical Evaluation Board without advising petitioner of its "point of disagreement" with the Evaluation Board—as required by published directives.

Petitioner took issue with the Council's omission of specifics on the "point of disagreement" with the Physical Evaluation Board and the resulting denial of an opportunity for any presentation of competent medical evidence to rebut the Council's decision.

The record was then referred to the Army Physical Disability Appeal Board, which on August 31, 1953, concurred in the action of the Council that petitioner was physically fit.

Following petitioner's protests concerning procedural omissions in his physical disability review process, the Inspector General, Fourth Army, at the direction of the Fourth Army Commanding General, conducted an investigation and by report of October 30, 1953, concluded that petitioner had not been advised of the reasons for or "the specific items of disagreement" which formed the basis for the action of the Physical Review Council and that this asserted lack of specific information precluded petitioner from directing his rebuttal to any specific point, while finding that all procedures prior to the Council action were proper.

The Fourth Army Report of Investigation was forwarded to The Inspector General of the Army, Washington, in November 1953, for further investigation and report. That officer passed the report to the Physical Review Council, whose previous actions in the controversy were questioned, and who in turn prepared the reply used by the Adjutant General in answering the Fourth Army Commander. The Inspector General made no investigation. The letter to Fourth Army from the Adjutant General's office on January 29, 1954,[2] concurred in the action by the Council and the Physical Disability Appeal Board rejecting petitioner's claim.

Early in 1954, as directed by the Department of the Army, petitioner was given another medical examination at Fort Sam Houston and again found physically incapacitated for active duty. Again he was ordered

[2] Exhibits filed below (Def. 20, 27, 49, 80) reveal that one specific officer in the Adjutant General's office, Lt. Colonel E. Rinaldi, was responsible for the processing of petitioner's case at several levels of review, which resulted in this officer, and others, actually reviewing decisions in which they had previously had a part in making.

into Brooke Army Hospital, and again a Medical Board convened at this Hospital, found him permanently unfit for military service, which finding was sustained by the Physical Evaluation Board which met on June 11, 1954, and concluded that petitioner was forty per cent disabled, an increase of ten per cent over the 1953 evaluation.

The Physical Review Council, however, on June 25, 1954, again disagreed with the Evaluation Board and, again, without a finding on the "point of disagreement" the Council concluded petitioner was physically fit. Again, petitioner objected to this procedure.

Petitioner's objection was forwarded to the Office of the Adjutant General, who directed it on to the Physical Disability Appeal Board on July 13, 1954. On the same date, and two days before the Board met on July 15, 1954, to consider the matter, the Adjutant General sent a telegram to the Commanding General at Brooke Army Hospital stating that the Army Physical Disability Appeal Board "CONCURS IN THE FINDINGS OF THE ARMY PHYS REVIEW COUNCIL THAT SUBJ OFFICER PHYS FIT FOR DY."

On July 19, 1954, a further medical examination at Fort Sam Houston found petitioner not qualified for active duty and recommended that he be separated for physical disability.

In November 1954, petitioner was transferred to Washington, and given a limited duty assignment. In July 1956, he was advised by the Adjutant General that he would be retired by operation of law on November 30, 1956.[3]

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[3] Officer Personnel Act of 1947, as amended, Section 514(d)(4), 10 U.S.C. § 3916, requiring the retirement of Regular Army permanent Lieutenant Colonels 30 days after the date of completion of 28 years service.

On November 14, 1956, the Secretary of the Army ordered petitioner to appear before a Medical Board at Walter Reed Army Medical Center and, if warranted, before a physical evaluation board. In proceedings before the Court below, petitioner took issue with the extent and fairness of the hearing process accorded him at Walter Reed.

On November 21, 1956, this Board concluded he was fit for general service. And on November 29, 1956, the Adjutant General so advised him. Petitioner remained on active duty subsequent to January 1, 1957.[4] He was released from active duty on January 31, 1957.

On February 9, 1957, petitioner sought a hearing before the Army Board for Correction of Military Records to change his discharge to one for physical disability. This application was denied without a hearing.

On August 14, 1957, he was rated twenty per cent disabled by the Veterans Administration by reason of arthritis of the cervical and lumbar spine.

In the petition filed in the Court of Claims, petitioner sought pay differential between the grades of Lieutenant Colonel and Colonel for a three year period, and a Federal Income tax adjustment for the disallowance by the Internal Revenue Service of disability tax credit.

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[4] To take advantage of the Servicemen's and Veterans' Survivor Benefits Act, ch. 837, 70 Stat. 857 (1956), codified in scattered sections of U.S.C.

REASONS FOR GRANTING THE WRIT

A. Judicial review to determine whether or not pay has allegedly been withheld from a member or former member of the military services, has long been sanctioned by the Court. *Reynolds* v. *United States,* 292 U.S. 443; *Dismuke* v. *United States,* 297 U.S. 167.

The Court of Claims has concluded that petitioner was not denied any procedural rights in the disability review process accorded him by the Army. That ruling is in conflict with the controlling decisions of this Court which have held that in the administrative review process the reviewing board is required to exercise its own judgment, following its receipt of all the evidence in the case, rather than tolerate any prejudgment. It conflicts with those decisions which hold that procedural directives validly prescribed by the Secretary of the Army have the force and effect of law and are binding upon the Secretary and the Army. It conflicts with previously reported decisions establishing the applicable standards for a determination of disability in military retirement cases.

B. The issues raised in this case present important questions on the administrative process governing the entire military retirement system for all members of the Armed Forces of the United States. Unless reversed, the decision of the Court of Claims in this case will furnish controlling abusive guidelines to be applied in the consideration of every military retirement application—without regard to the applicable statutes and regulations.

We now outline these reasons in detail.

I

The Prejudgment by the Army Physical Disability Review Board Prior to Its Actual Convening Constituted a Denial of Due Process

Following the adverse ruling of the Physical Review Council in 1954, petitioner sought review by the Army Physical Disability Appeal Board, as granted in AR 15-160 (Appendix C). The report of the Physical Evaluation Board was transmitted by the Adjutant General to the Appeal Board on July 13, 1954.[5] The Appeal Board's official report to the Adjutant General was made by the Board's Recorder on July 15, 1954, two days later. (Appendix D)

But two days before the Board convened and entered its official decision, the Adjutant General, (on July 13, 1954) telegraphed the Commanding General at Brooke Army Hospital in Texas as follows:

> "TAG 44204 FROM AGPOSR YOUR M111700Z PARA REVIEW OF RECORDS CASE LT COL JOSEPH J IMHOFF 051009 QMC REVEALS ARMY PHYS DISABILITY BD CONCURS IN THE FINDINGS OF THE ARMY PHYS REVIEW COUNCIL THAT SUBJ OFFICER PHYS FIT FOR DY"
>
> (Pls. Ex. 10 and 17, reproduced in Appendix E)

The report by the Adjutant General was a prejudgment[6] of the Board's decision before the Board even convened to consider any of the evidence referred to it for consideration. The findings of this Board in 1954, just as in the 1953 proceedings, were not disclosed to petitioner.

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[5] Reproduced in Appendix D.

[6] Prejudgment here is analogous to an adjudication of guilt in advance of trial—a denial of due process guaranteed under the Fifth Amendment to the Constitution.

When a board *fails to exercise its own discretion* in rendering a decision, its proceeding is improper. *Accardi* v. *Shaughnessy*, 347 U.S. 260.

The right to full and fair consideration by an impartial review board is one of the fundamental rights, it is part of the "law of the land." *Davidson* v. *New Orleans*, 96 U.S. 97, 101; *Railroad Commission* v. *Pacific Gas Co.*, 302 U.S. 388, 393; *Jordan* v. *Massachusetts*, 225 U.S. 167, 176.[7] The rights of the retiring officer in his retirement must be protected by the rudimentary requirements of fair play and in terms of administrative consideration, such right is guaranteed only by a "fair and open hearing." *Morgan* v. *United States*, 304 U.S. 1, 15. At the very least the nominal guarantees of due process, which include a fair hearing and fair consideration, are in order. *Weiman* v. *Updegraff*, 344 U.S. 183.

When the Secretary of the Army, acting through his Army Physical Disability Appeal Board and the Office of the Adjutant General, prejudged the case, the retirement process was abused by "failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress[8] has authorized." *Dismuke* v. *United States*, 297 U.S. 167, 172.

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[7] Petitioner's entitlement to a "full and fair" hearing is guaranteed under 10 U.S.C. § 1214. (See Note 8, *infra*.)

[8] 10 U.S.C. 1214 provides:

> "No member of the Armed Forces may be retired or separated for physical disability without a full and fair hearing if he demands it."

And 10 U.S.C. 1216 authorizes the Secretary of the Army to prescribe the regulations for the disability review process.

II

The Applicable Directives and Regulations Require Issuance by the Physical Review Council of Specific Findings Which the Council Failed and Refused to Do

The Court of Claims concluded that DA Pamphlet 21-48 (Appendix B) "does not purport to be a regulation as such" (Appendix A, p. 8a, footnote 7). In its answer to the petition filed in the Court of Claims, defendant admitted that the document was "promulgated for compliance by all of the Armed Forces and applicable here" (par. 8 of Answer).

The document itself (1953 Edition) (Appendix B, p. 39a) details that it is "published for the information and guidance of all concerned," "BY ORDER OF THE SECRETARIES OF THE ARMY, THE NAVY, THE AIR FORCE, AND THE TREASURY."[9]

The directive is issued as part of the retirement process and guaranteed to petitioner the following procedural rights which were denied:

(a) The right to have the Physical Review Council issue specific findings following its review (Appendix B, p. 38a).

(b) The right of petitioner to send in another statement "on the point of disagreement" if the Council did not agree with the Physical Evaluation Board (Appendix B, p. 37a).

AR 15-160 (Appendix C) also makes provision for findings by the Army Physical Review Council. No specific findings on this case were made, as the Fourth Army Inspector General later found. Petitioner was,

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[9] The 1952 Edition (Appendix B, p. 31a) was issued by Order of the Secretaries of the Army and Air Force.

therefore, absolutely unable to rebut the issue raised against him, because the only determination ever issued by the Council was that petitioner was considered "to be physically fit to perform the duties of [his] office and rank"—a conclusion equally applicable to any conceivable retirement case where the Council disagrees with the Physical Evaluation Board.

Of the two applicable alternatives (Appendix B, p. 37a), the Council could either "agree with the recommendations" of the Physical Evaluation Board or it could disagree, provided it notified petitioner of his "*right* to send in another statement on the point of disagreement" (emphasis added). It had no authority to act otherwise. When its erroneous and generalized conclusion was adopted by the several reviewing panels thereafter, this served only to compound the initial error.

The maintenance of proper standards in the retirement process, just as in any administrative proceeding, dictates that the petitioner be accorded a reasonable opportunity to know the medical contentions raised against him, as shown by the findings advanced by the Physical Review Council, in order to contest them. *Morgan* v. *United States,* 304 U.S. 1, 21-22.

For if the board or council has authority to make the order or determination and, if that authority depends upon determinations of fact, those determinations must be shown. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388.

An administrative board must not shelter behind uncritical generalities. *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61; *United States* v. *Chicago M. St. P. & P.R. Co.,* 294 U.S. 499, 510, 511; *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515.

Findings must be definite, specific, and accurate. *Atchison T. & S F. R. Co.* v. *United States,* 295 U.S. 193, 201-202.

This Court has firmly established the principle that if a Government official or agency lawfully prescribes rules of procedure, these are binding on the Government as well as the petitioner. *Accardi* v. *Shaughnessy,* 347 U.S. 260, 267; *Bridges* v. *Wixon,* 326 U.S. 135, 153; *Chapman* v. *Sheridan-Wyoming Co.,* 338 U.S. 621; *Bilokumsky* v. *Tod,* 263 U.S. 149, 155. The rule applies even where the administrative action under review is discretionary in nature.

Similarly, military regulations have long been so recognized, *Ex parte Reed* 100 U.S. 13, 22; *Caha* v. *United States,* 152 U.S. 211, 221-22. Even the provisions of a War Department Technical Manual can furnish the guidelines for administrative due process in retirement cases. *Dickson* v. *United States,* 159 Ct. Cls. 185 (1962). A policy directive issued by the Secretary of the Air Force has been accorded the same force and effect as a regulation. *Roberts* v. *United States,* 151 Ct. Cls. 360, 365 (1961). The agency's interpretation of its own procedural rules is binding. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 143. Procedural rules designed to govern the agency's own board proceedings are usually considered legislative rules, and legislative rules, such as the Armed Services Procurement Regulations, have been held to have "the force of law." *Paul* v. *United States,* 371 U.S. 245, 255.

The applicable directives here, having the force and effect of law, were issued to be followed. Their disregard furnishes ample reason for the grant of this petition.

III

The Opinion of the Court of Claims If in Direct Conflict With Its Opinion in Weiner v. United States

The Court of Claims' Opinion in *Weiner* v. *United States,* 148 Ct. Cls. 445 (1960), clearly sets the test for disability as physical incapacity for "performance of full military duty, field as well as garrison in both peace and war" (148 Ct. Cls. at 455).

Despite the unequivocal test established by the *Weiner* decision, the Court of Claims' opinion below (Appendix A, p. 6a), centers about petitioner's ability to perform his admitted limited service "desk job" and the duties assigned in connection therewith, rather than "full military duty." This is a major error.

Ten duly constituted Army Medical boards, before which petitioner personally appeared, were unanimous in finding petitioner physically unfit for duty under the standards for fitness set forth in the *Weiner* decision. This included a final type medical report at Walter Reed on January 31, 1956 (Appendix A, p. 19a), which also showed petitioner to be unfit. The eleventh, and only board before which he appeared (Medical Board at Walter Reed on November 21, 1956) which did not find petitioner physically unfit, denied him a "full and fair hearing" (10 U.S.C. 1214) when, among other irregularities, (1) the Board report of proceedings was prepared in advance of the hearing by its Recorder; (2) the Board president signed the Board report before the hearing had closed, and one Board member failed to sign the report; and (3) the Board president denied petitioner the right to complete the presentation of his case before the Board with the explanation that the Board had reached its decision prior to convening. This was another case of prejudgment. In this instance, petitioner was not examined

by any Medical Officer. This proceeding was prejudicial and denied petitioner the right of further consideration by a Physical Evaluation Board—which was the only course of action warranted by petitioner's medical record.

In every case where he was personally examined by a medical officer, petitioner was found unfit for military duty. The Court of Claims has applied a completely different standard in the case below in reviewing petitioner's record. It has measured petitioner's fitness by his ability to perform a "desk job" rather than by his fitness for general military duty. This is contrary to its decision in *Weiner,* prejudicial to petitioner, and denies him the consideration to which he is entitled by the established precedent. In so holding, the Court of Claims is in conflict with its own decision in the *Weiner* case.

If the decision of the Court of Claims is permitted to stand, it will become the final word on the standards to be applied in physical disability cases. The erroneous procedural review will become the accepted practice for the military boards to follow. Guarantees of due process and fair treatment will be discarded. An authoritative review of such procedures is required and must be settled in this case.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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July 12, 1967